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No. 91-208

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In the Supreme Court of the United States

OCTOBER TERM, 1991

ELAINE M. KITOWSKI, PERSONAL REPRESENTATIVE OF THE ESTATE OF LEE WILLIAM MIRECKI, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the standards established in *Feres* v. *United States*, 340 U.S. 135 (1950), and the decisions that have relied on it, should be overturned so as to permit imposition of liability on the government when injury to an active-duty servicemember arises out of "egregious" conduct "incident to service."

2. Whether the court of appeals properly concluded that the servicemember in this case was not "effectively" discharged from the Navy at the time of his death.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A6) is reported at 931 F.2d 1526. The opinion of the district court (Pet. Supp. App. A7-A11) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 29, 1991. The petition for a writ of certiorari was filed on August 1, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Airman Recruit Lee Mirecki entered active duty with the Navy in 1987. Mirecki's enlistment contract guaranteed him specialized training as an Aviation Anti-Submarine Warfare Operator (AW). That training required Mirecki to complete a program at the Rescue Swimmer School (RSS) at the Naval Air Station in Pensacola, Florida. The RSS program involved "rigorous training to prepare recruits for retrieving downed aircraft carrier-based airmen under wartime conditions." It included a drill in which the instructors, simulating victims in a state of panic, grasped a student in a head hold, requiring the student to perform the appropriate release procedure. If the student was not able to do so, he or she received further instruction. At the outset of the RSS training, Mirecki signed an agreement that permitted him to "drop-on-request" or "DOR" the course. A student who dropped the training forfeited eligibility for the AW program, and had to elect either reassignment or discharge from the Navy. Pet. App. A2-A3.

During a training course in February 1988, Mirecki—who had in childhood developed a fear of being held under water—could not complete the rescue drill and voluntarily withdrew from the RSS. Following a series of physical and psychological tests, however, Mirecki re-enrolled—allegedly as a result of pressure from RSS instructors. On March 2, 1988, while taking part in the same simulated rescue drill, Mirecki again encountered great difficulty and sought to drop the course. The instructors did not comply with that request or with his request not to reenter the pool. Rather, they required Mirecki to continue the training, physically forced him back into the water, and performed a process that entails holding the trainee under water until he or she tem-

porarily loses consciousness. As a consequence, Mirecki lost consciousness and died shortly thereafter. Pet. App. A2-A3.

2. On January 25, 1990, petitioner—acting as personal representative of Mirecki's estate—filed this lawsuit in the United States District Court for the Northern District of Florida under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 (FTCA). The complaint alleged that the government's negligence proximately caused Mirecki's wrongful death. The government moved, *inter alia*, to dismiss for lack of subject matter jurisdiction under *Feres* v. *United States*, 340 U.S. 135, 146 (1950), which provides that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." Finding that Mirecki was on active duty and sustained his injuries incident to his duties, and that the alleged tortfeasors were also on duty and acting within the scope of their duties, the district court granted the government's motion to dismiss under *Feres*. Pet. Supp. App. A8-A10.

3. The court of appeals affirmed, concluding that Mirecki's injuries arose from activity incident to service because "[he] was on active duty; his death occurred on a Navy base; and he was engaged in a prescribed training exercise." Pet. App. A6. In so holding, the court rejected petitioner's request that it overturn this Court's decision in *Feres*. Pet. App. A4-A5. The court also determined that Mirecki had not been discharged from active duty by his oral DOR request at the time of the alleged tortious acts. Pet. App. A5. Finally, the court of appeals declined to craft an "egregious" conduct exception to *Feres*, noting that this Court in *United States* v. *Stanley*, 483 U.S. 669 (1987), had refused to do so in the context of applying

Feres to a tort action brought against federal officials under *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Pet. App. A5-A6.

ARGUMENT

The decision of the court of appeals correctly adheres to this Court's decisions applying the *Feres* doctrine, and does not conflict with the decisions of any other court of appeals. Further review is therefore unwarranted.

1. Petitioner first asks that *Feres* be overruled in its entirety. Pet. 24-25. This Court, however, expressly reaffirmed the validity of the *Feres* doctrine just over four years ago in *United States* v. *Johnson*, 481 U.S. 681 (1987). Since that time, nothing has occurred to warrant yet another reexamination of the doctrine. Therefore, considerations of *stare decisis*, as well as the rationales underlying *Feres* and its progeny, strongly support the continuing validity of the *Feres* doctrine.[1]

a. "[A]ny departure from the doctrine of *stare decisis* demands special justification." *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172 (1989). Moreover, "the burden borne by the party advocating the abandonment of an established precedent is greater where the Court is asked to overrule a point of statutory construction." *Ibid.* "Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done."

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[1] Indeed, this Court recently denied another petition for a writ of certiorari seeking to overturn *Feres*. See *Sonnenberg* v. *United States*, 111 S. Ct. 782 (1991).

Id. at 172-173.[2] Hence, petitioner bears a heavy burden in arguing that *Feres* should be overruled. Petitioner cannot carry that burden because none of the "special justifications" recognized in *Patterson* is available here.

First, arguments about whether *Feres* was decided correctly in light of the FTCA's language and history "were examined and discussed with great care," *Patterson*, 491 U.S. at 171, in *United States* v. *Johnson*, *supra*. Four dissenting Justices in *Johnson* argued that *Feres* should be limited because, in their view, it was wrongly decided in the first place. 481 U.S. at 692. The majority, however, found that argument "unconvincing." *Id.* at 689 n.9. The majority noted that Congress has not acted to modify or set aside the *Feres* bar to suits "in the close to 40 years since it was articulated, even though, as the Court noted in *Feres*, Congress 'possesses a ready remedy' to alter a misinterpretation of its intent." 481 U.S. at 686. The majority explained, *ibid.*, that the Court "has never deviated" from holding that servicemembers may not sue the United States for injuries "that arise out of or are in the course of activity incident to service," *Feres*, 340 U.S. at 146, and the Court "decline[d] to modify the doctrine at this late date." *Johnson*, 481 U.S. at 688.

Congress has now had another four years since the decision in *Johnson* to repeal the *Feres* doctrine, yet it has not done so. Reconsideration of *Feres* now would serve only to engender the confusion and instability that occurs when a "well established" precedent such

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[2] See also *United States* v. *South Buffalo Ry.*, 333 U.S. 771, 774-775 (1948) ("[W]hen the questions are of statutory construction, not of constitutional import, Congress can rectify our mistake, if such it was, or change its policy at any time, and in these circumstances reversal is not readily to be made.").

as *Feres*, see *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666, 670 (1977), is overruled.

Second, the *Feres* doctrine has not proved to be "unworkable" or "inconsistent with the sense of justice or with the social welfare." *Patterson*, 491 U.S. at 174. To the contrary, *Feres*'s "incident to service" test has provided a simple rule of decision that the government and the courts have been able to apply with relative ease. See, *e.g.*, *United States* v. *Stanley*, 483 U.S. 669, 683 (1987) (adopting "incident to service" test for determining *Bivens* liabilty in servicemember suits against federal officials in part because the test "provides a line that is relatively clear"). This is well illustrated by the fact that only a limited number of *Feres* cases have made their way to this Court in the 40 years since *Feres* was decided. Only three of those cases concerned application of the test to FTCA claims against the military.[3] The remainder concerned the extension of *Feres* to other classes of cases.[4]

Finally, *Feres* is not incompatible with the law as it has developed in other areas. Cf. *Patterson*, 491 U.S. at

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[3] See *United States* v. *Johnson*, *supra* (*Feres* bars FTCA claim by servicemember's estate for injuries caused by civilian employees of the United States); *United States* v. *Shearer*, 473 U.S. 52 (1985) (*Feres* bars FTCA action brought by estate of serviceman who was murdered by another serviceman while off duty and off the military base); *United States* v. *Brown*, 348 U.S. 110 (1954) (*Feres* does not bar FTCA claims by discharged servicemembers for post-discharge injuries).

[4] See *United States* v. *Stanley*, *supra* (*Feres* extended to bar *Bivens* claims by servicemembers); *Chappell* v. *Wallace*, 462 U.S. 296 (1983) (same); *Stencel Aero*, *supra* (*Feres* bars indemnification action against United States for damages paid by third party to serviceman injured in course of military service); *United States* v. *Muniz*, 374 U.S. 150 (1963) (*Feres* not extended to bar FTCA suits by federal prisoners for injuries in federal prison resulting from negligence of government employees).

173. Indeed, *Feres* has been woven into the fabric of the law in a number of respects. For example, the Court has adopted the *Feres* test to determine the circumstances under which servicemembers may sue a federal official for violations of constitutional rights. *Stanley*, 483 U.S. at 684. *Feres* also has been held to bar indemnification actions against the United States for damages paid by third parties to servicemembers who are injured in the course of duty. See *Stencel Aero*, *supra*. Overruling *Feres* now would undermine settled precedents in a number of related areas of the law.

b. The policies underlying *Feres* remain valid. First, to allow servicemembers to sue the military for service-connected injuries could have a severe impact on military discipline, morale, and control. Soldiers are trained to obey their superiors, not sue them. Suits by soldiers involving issues of military discipline would raise concerns about the disruption of the "'peculiar and special relationship of the soldier to his superiors' that might result if the soldier were allowed to hale his superiors into court." *Chappell* v. *Wallace*, 462 U.S. 296, 304 (1983). The military is a special society, and the relationship between the government and members of its armed forces is "distinctively federal in character." *Johnson*, 481 U.S. at 689. Indeed, "centuries of experience have developed a hierarchical structure of discipline and obedience to command, unique in its application to the military establishment and wholly different from civilian patterns." *Chappell*, 462 U.S. at 300.[5]

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[5] Moreover, if *Feres* were overruled, the military would be confronted with "compelled depositions and trial testimony by military officers concerning the details of their military commands." See *Stanley*, 483 U.S. at 682-683. "Even putting aside the risk of erroneous judicial conclusions (which would becloud

Allowing servicemembers to bring FTCA suits for service-related injuries also would undermine the commitment to duty that the military services require. As this Court wrote in *Johnson*, "military discipline involves not only obedience to orders, but more generally duty and loyalty to one's service and to one's country. Suits brought by servicemembers against the Government for service-related injuries could undermine the commitment essential to effective service and thus have the potential to disrupt military discipline in the broadest sense of the word." 481 U.S. at 691.

The existence of "generous statutory disability and death benefits" for servicemembers and their families is an additional, and independent, reason supporting *Feres*. See *Johnson*, 481 U.S. at 689. Under the Veterans' Benefits Act of 1958, 38 U.S.C. 301 *et seq.*—a statute that has been amended a number of times since *Feres*—"[t]hose injured during the course of activity incident to service not only receive benefits that 'compare extremely favorably with those provided by most workmen's compensation statutes,' * * * but the recovery of benefits is 'swift [and] efficient,' * * * normally requir[ing] no litigation." *Johnson*, 481 U.S. at 690. It is "difficult to believe that Congress would have provided such a comprehensive system of benefits while at the same time contemplating recovery for service-related injuries under the FTCA." *Ibid.*

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military decisionmaking), the mere process of arriving at correct conclusions would disrupt the military regime." *Id.* at 683. In addition, requiring the military to respond to FTCA suits by servicemembers for injuries arising out of service-connected activities would drain military resources and would divert military personnel from their primary task of defending the nation.

2. Petitioner alternatively asks this Court to discard the existing "incident to service" test, *Feres*, 340 U.S. at 146, in favor of one permitting actions against the United States for service-related injuries arising from "egregious" circumstances. Pet. 12-21. Contrary to her contentions, however, an "egregiousness" exception to the "incident to service" test is contradicted both by the decisions of this Court and by the rationale of the *Feres* doctrine.

Petitioner contends that authority for her modification to *Feres* may be derived by combining the dissent in *Johnson*—which argued that *Feres* erroneously interpreted the FTCA, see 481 U.S. at 692—with Justice O'Connor's dissent in *Stanley*—which would have established an exception to *Feres* for conduct "so far beyond the bounds of human decency that as a matter of law it simply cannot be considered a part of the military mission," 483 U.S. at 709. But this Court's decisions, and not its dissents, are the law, and the decisions in *Johnson* and *Stanley* together plainly contradict petitioner's proposed standard.[6] Specifically, *Johnson* expressly reaffirmed the vitality

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[6] In addition, while the *Johnson* dissent sharply criticized the *Feres* doctrine, the FTCA claimant there did not raise, and the dissent explicitly reserved, the question whether *Feres* should be overruled. 481 U.S. at 692, 703 (Scalia, J., dissenting). Justice O'Connor's remarks in *Stanley*, moreover, pertained to events—the "deliberate and calculated exposure of otherwise healthy military personnel to medical experimentation without their consent"—that occurred "outside of any combat, combat training, or military exigency." 483 U.S. at 709. By contrast, the events here arose directly out of combat training. Pet. App. A2 (program in which petitioner had enrolled "prepare[d] recruits for retrieving downed aircraft carrier-based airmen under wartime conditions"). Hence, even if those dissents were the law, it is doubtful whether petitioner's claim would state a cause of action.

of the *Feres* doctrine as an interpretation of the FTCA, and *Stanley* made clear that the *Feres* doctrine's "incident to service" test embodies no exception for torts arising out of egregious conduct.

In *Stanley*, this Court applied *Feres* to bar a *Bivens* action brought by a former serviceman who alleged that he had been the subject of Army experiments conducted with LSD. The *Stanley* Court explicitly rejected a test, similar to petitioner's, that would have restricted *Feres* immunity to cases where there is "reason to believe that in the particular case the disciplinary structure of the military would be affected—thus, * * * allowing, for example, suits for officer conduct so egregious that no responsible officer would feel exposed to suit in the performance of his duties." 483 U.S. at 681. The Court instead adhered to the "incident to service" test that *Feres* had established, seeing no "reason why our judgment in the *Bivens* context should be *any less protective of military concerns than it has been with respect to FTCA suits, where we adopted an 'incident to service' rule.*" *Ibid.* (emphasis added). Hence, in explicitly selecting the FTCA's "incident to service" test over an *alternative*, "egregious" conduct test, the *Stanley* Court plainly indicated that the former did not encompass, and was in fact incompatible with, the latter.

While acknowledging that *Stanley* apparently forecloses her "egregious" circumstances test, petitioner attempts to evade the force of that decision by observing that it was a *Bivens*, and not an FTCA, action. Pet. 14. As discussed, however, *Stanley* expressly used the scope of existing *Feres* immunity *under the FTCA* as its point of reference in rejecting an egregiousness test. Thus, *Stanley* embodies a recent and clear interpretation of this Court's decisions applying *Feres* in the

FTCA context, and squarely contradicts petitioner's position here.

The "egregious" conduct exception urged by petitioner would, moreover, seriously erode the underlying rationale of *Feres*. An "egregiousness" test is not only inherently subjective, but also would inevitably require judicial intrusion into military decision making. Under the test of the *Stanley* dissent that petitioner urges this Court to embrace for the FTCA, the *Feres* bar would be lifted for conduct so egregious that "it simply cannot be considered a part of the military mission." 483 U.S. at 709 (O'Connor, J., dissenting). This test necessarily requires a judicial process of elimination of potential military justifications for what is apparently egregious conduct. That, in turn, "rais[es] the prospect of compelled depositions and trial testimony by military officers concerning the details of their military commands"—a prospect that the *Stanley* Court found unacceptable. *Id.* at 682-683. Because of the potential "effect * * * upon military discipline," this Court has been loath to extend the government's liability when doing so would place "at issue * * * the degree of fault, if any, on the part of the Government's agents and the effect upon the serviceman's safety," or "would * * * involve second-guessing military orders, and * * * often require members of the Armed Services to testify in court as to each other's decisions and actions." *Stencel Aero*, 431 U.S. at 673. By contrast, as the *Stanley* Court observed, the unadulterated "incident to service" test "provides a line that is relatively clear and that can be discerned with less extensive inquiry into military matters." 483 U.S. at 683.[7]

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[7] Petitioner argues that concerns of military discipline and effectiveness should not preclude the adoption of her proposed

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Finally, petitioner cites, and we are aware of, no decision of a court of appeals that has embraced the standard she proposes here.[8] Absent any conflict in authority over petitioner's "egregiousness" test, or any support for that test in the holdings or rationales

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exception to *Feres* because (a) military decisions are second-guessed every time a civilian official sues under the FTCA for acts of military officials; (b) morale and military discipline may actually improve if military personnel can recover under the FTCA; (c) soldiers must obey the lawful orders of their superiors or face courts-martial; and (d) imposing liability on the *government* in this context will not chill the decision making of its *officials*. Pet. 18-19. She further contends that tort liability is necessary to assure that the military is subject to an effective system of checks and balances. Pet. 19-20. Those arguments, however, merely speak to whether *Feres* is a valid interpretation of the FTCA. As discussed, this Court recently determined that it was, see *Johnson*, 481 U.S. at 686-691, and earlier this year denied a petition for a writ of certiorari requesting that *Feres* be overruled, see *Sonnenberg* v. *United States*, 111 S. Ct. 782 (1991).

[8] Petitioner cites *Hinkie* v. *United States*, 715 F.2d 96, 98 n.3 (3d Cir. 1983), cert. denied, 465 U.S. 1023 (1984), for the principle that adherence to *Feres* may yield the harsh result of defeating liability for acts that would offend standards of decency under certain international conventions. The *Hinkie* court recognized, however, that Congress alone could address that concern, and noted that "there has still been no Congressional resolution of this vexing problem." 715 F.2d at 98-99 n.3.

of this Court's decisions,[9] further review of her claim is unwarranted.

3. Petitioner argues that Mirecki had been "effectively discharged" at the time of his death, making *Feres* inapplicable here. Pet. App. 21-24. The governing legal standard is not in dispute. *Feres* does not apply if a servicemember is injured when his or her "status [is] tantamount to being discharged." *Bankston* v. *United States*, 480 F.2d 495, 497 (5th Cir. 1973). The district court here explicitly concluded that Mirecki had not been effectively discharged at the time of the fatal events, Pet. Supp. App. A9-A10, and the court of appeals affirmed. Pet. App. A5. Because the lower courts' uniform holdings on this point "essentially rest[] on [a] determination of factual issues"—whether the steps necessary for a discharge had been taken—this Court will not overturn it "unless it has no support in the record." *United States* v. *Doe*, 465 U.S. 605, 613-614 (1984). The lower courts' conclusion, however, has ample support in the record, and further review is unwarranted.

Petitioner does not dispute that Mirecki's participation in the RSS training program constituted "active duty." Rather, she contends that Mirecki's statements just prior to the fatal events—*i.e.*, "I quit" and "I

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[9] Contrary to petitioner's assertion, Pet. 16, this Court's decision in *Wilkes* v. *Dinsman*, 48 U.S. (7 How.) 89 (1849)—in which a seaman sued his commanding officer for assault, battery, and false imprisonment, *ibid.*—does not support her position here. To whatever extent *Wilkes* recognized a common law cause of action against a naval officer for intentional torts against a subordinate, it does not speak to the liability of the United States under the FTCA, as construed by *Feres* and its progeny. In any case, an action alleging such torts would not be within the FTCA's waiver of sovereign immunity. See 28 U.S.C. 2680(h).

DOR"—effected his discharge from the Navy. Pet. 22. It is true that Mirecki had a contractual right to drop the RSS training course, and that doing so would render him ineligible to continue in the AW program. Pet. App. A2. As the court of appeals properly held, however, even if Mirecki had effectively withdrawn from the RSS course, he remained a member of the Navy pending his election between a discharge and a transfer to other duties. Pet. App. A5. Petitioner further claims, without record citation, that Mirecki told friends that he would resign from the Navy if he did not succeed in the AW training. Pet. 22, 24. But as petitioner acknowledged before the district court, Mirecki's "right to withdraw was contingent on the present intent to resign and signing of the appropriate discharge papers." Pet. Supp. App. A10. Hence, Mirecki was on active duty at the time of the fatal events that form the basis of petitioner's suit here.

This action, moreover, stands in sharp contrast to the cases upon which petitioner relies.[10] In *Harvey* v. *United States*, 884 F.2d 857, 858 (5th Cir. 1989), the plaintiff was hurt while on final leave just prior to his scheduled date of separation. He was placed on medical hold for disability processing, and during that time sustained an injury in a federal hospital. The latter injury was the subject of his FTCA action, and the court of appeals held that *Feres* did not apply. "Although a medical hold extends the period of active duty," the court reasoned, "the sole purpose of the extension is to facilitate medical examination."

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[10] Plaintiff's decedent in *Bankston* was on final leave awaiting discharge when the alleged tort occurred. 480 F.2d at 495. The court of appeals remanded the case to the district court for determination of factual issues relevant to whether the decedent's status at the time of the alleged tort was tantamount to discharge. *Id.* at 498.

Id. at 860. The court found that concerns of military discipline and decisionmaking underlying *Feres* were not implicated. *Id.* at 861.

By contrast, Mirecki's RSS training for at-sea rescues under wartime conditions indisputably placed him on active duty status, and made him subject to military discipline and command, when the relevant events commenced. The only issue for the district court was whether he had taken sufficient steps to alter that status prior to the commission of the alleged tort. The very distinct issue decided in *Harvey*—whether a medical hold implicates the rationale of *Feres*—has no bearing on the effect of Mirecki's actions seeking to drop his RSS training course at the time of the alleged tort.

Nor does *Adams* v. *United States*, 728 F.2d 736 (5th Cir. 1984), in which a serviceman died in a federal public hospital while on "indefinite excess leave" following a court-martial. After the decedent's court-martial had become final, the Army notified him to report for formal separation. He had not done so by the time of the alleged tort, having used an expired military identification to gain admittance to the federal hospital where he was allegedly fatally harmed. *Id.* at 737-738. As the court of appeals held, the decedent's status at the time of his death was tantamount to being discharged. *Id.* at 739. He was not receiving any pay from the Army, *id.* at 737, and the Army had done all that it could do to effect his discharge. *Id.* at 739. This is in marked contrast to the present case, in which Mirecki had merely indicated his desire to drop the RSS course. At the time of the alleged tort, the steps necessary to alter his existing status as an active member of the Navy had not been taken.

In sum, because Mirecki was never formally discharged from the military or placed on any status

"tantamount to discharge," he remained on "active duty," for purposes of *Feres*, at the time of his death. The courts below therefore correctly applied *Feres* to bar petitioner's suit here. In any case, further review is not warranted to address petitioner's claim that the court of appeals erred in applying settled law to the facts of this case.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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